

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GAYLE A. KERN, individually, and GAYLE
A. KERN, LTD., doing business as KERN &
ASSOCIATES, a Nevada limited liability
company,

Plaintiffs,

v.

SHERYL MOULTON, and DOES 1 through
10, inclusive,

Defendants.

3:11-cv-296-RCJ-PAL

ORDER

This abuse of process and defamation suit was brought by Plaintiffs Gayle A. Kern and Gayle A. Kern, Ltd. (collectively "Kern") in response to numerous suits filed and defamatory statements made by Defendant Sheryl Moulton. Currently before this Court are Moulton's motion to proceed anonymously (#42), motion to dismiss (#45), and motion for disqualification (#47). For the following reasons, Moulton's motions to proceed anonymously (#42) and for disqualification (#47) are denied. Moulton's motion to dismiss (#45) however is granted in part and denied in part.

BACKGROUND

Plaintiff Gayle A. Kern, a Nevada resident, is an attorney and sole owner of Gayle A. Kern, Ltd., a Nevada limited liability company doing business as Kern & Associates. (Compl. (#1) at 1). Kern represents various homeowners, condominium associations, and their boards of directors, including Lakeside Plaza Condominium Association ("Lakeside Plaza") and Salem Plaza Condominium Association ("Salem Plaza"). (Compl. (#1) at 1; Opp'n to Mot. to Proceed

1 Anonymously (#44) at 2). Part of her legal duties in representing these clients is to initiate
2 foreclosure proceedings on their behalf. (Opp'n to Mot. to Proceed Anonymously (#44) at 2).
3 Defendant Sheryl Moulton, a resident of California, was a property owner and member of
4 Lakeside Plaza and Salem Plaza and became delinquent on payments owed to the
5 associations. (Compl. (#1) at 2; Opp'n to Mot. to Proceed Anonymously (#44) at 2). As a
6 result, Kern was asked to initiate proceedings against Moulton's properties. (Opp'n to Mot. to
7 Proceed Anonymously (#44) at 2).

8 Aggrieved by these actions, Moulton pursued five separate lawsuits (*Moulton I-V*)¹ in
9 this Court against Kern, all based upon the same underlying facts and arising from the same
10 transaction and events. (Compl. (#1) at 2-4). These complaints were filed from November
11 2007 to February 2011 and all were dismissed in their entirety as meritless. (*Id.*). The Court
12 further warned that if any additional suits were filed based on the same underlying facts,
13 Moulton would be ordered to show cause as to why sanctions should not be granted. (Order
14 (#44-1) at 2).

15 Kern then filed this complaint against Moulton in the District of Nevada on April 26,
16 2011, alleging five causes of action. (Compl. (#1)). The first cause of action alleges abuse
17 of process and malicious prosecution based on the five actions Moulton filed against Kern over
18 the past four years. (*Id.* at 5). The second cause of action alleges defamation per se, claiming
19 Moulton published false and defamatory statements regarding Kern. (*Id.* at 5-6). The third
20 cause of action is for business disparagement and alleges Moulton published false and
21 disparaging statements concerning Gayle A. Kern, Ltd. (*Id.* at 6). The fourth cause of action
22 alleges Moulton has publicly placed Kern in a false light that would be highly offensive and
23 objectionable to a reasonable person. (*Id.* at 7). Finally, the fifth cause of action seeks
24 injunctive relief directing Moulton to "re-tract the statements she made about Kern and to
25

26 ¹ These include Case No. 3:08-cv-176-RCJ-VPC (*Moulton I*), Case No. 3:08-cv-253-
27 RCJ-RAM (*Moulton II*), Case No. 3:09-cv-16-RCJ-VPC (*Moulton III*), Case No. 2:10-cv-2264-
28 PMP-GWF (*Moulton IV*), and Case No. 3:11-cv-87-RCJ-RAM (*Moulton V*).

1 prohibit Moulton from publishing further false and defamatory statements about Kern in the
 2 future.” (*Id.*). Kern further seeks general, special, and punitive damages in excess of \$75,000
 3 resulting from Moulton’s conduct. (*Id.* at 8).

4 On September 22, 2011, Moulton—who is appearing pro se—filed a motion to proceed
 5 anonymously. (Mot. to Proceed Anonymously (#42)). Moulton argues that because she is
 6 alleging that Kern (1) conspired with others to harm her, (2) fraudulently obtained restraining
 7 orders, and (3) engaged in perjury, she has reason to fear for her personal safety and should
 8 be allowed to proceed under the pseudonym “Jane Doe.” (*Id.* at 8-10).

9 On October 3, 2011, Moulton filed a motion to dismiss the complaint. (Mot. to Dismiss
 10 (#45)). In her motion to dismiss, Moulton makes numerous contentions as to why the Court
 11 should dismiss the complaint, ranging from failure to state a claim and immunity under the
 12 Communications Decency Act to the fair use doctrine and violations of the Equal Protection
 13 Clause of the United States Constitution. (*Id.* at 5-37).

14 On October 11, 2011, Moulton filed a motion for the disqualification of Chief Judge
 15 Robert C. Jones in this action. (Mot. for Disqualification (#47)). Moulton contends Chief Judge
 16 Jones should be disqualified from hearing this matter because he allowed Kern to commit
 17 perjury in open court and may be called as a material witness to this perjury. (*Id.* at 10, 20).

18 DISCUSSION

19 I. Motion to Proceed Anonymously

20 The public generally has a common law right of access to judicial proceedings. *Nixon*
 21 *v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597-99 (1978). Nevertheless, a court may permit
 22 parties to proceed anonymously when special circumstances justify secrecy and the need for
 23 unanimity outweighs any prejudice to the opposing party and the public’s interest in knowing
 24 the party’s identity. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68 (9th
 25 Cir. 2000). Special circumstances exist when disclosure of the party’s identity “is necessary
 26 to protect a person from harassment, injury, ridicule or personal embarrassment.” *Id.* at 1068
 27 (quoting *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981)). When a pseudonym
 28 is used to shield a party from retaliation, the district court must analyze the following factors

1 in determining whether the court should allow the party to proceed anonymously: (1) the
2 severity of the threatened harm; (2) the reasonableness of the anonymous party's fear; and
3 (3) the anonymous party's vulnerability to retaliation. (*Id.*).

4 The above factors for retaliation do not weigh in favor of allowing Moulton to proceed
5 anonymously. First, there is no threat of retaliation. Moulton seems to characterize herself as
6 a whistleblower and claims that Kern is conspiring with the police department of the City of
7 Sparks and others to harm Moulton, putting her at risk of "unlawful arrest and personal harm."
8 (Mot. to Proceed Anonymously (#42) at 9). Yet in this action Moulton is not a
9 plaintiff/whistleblower, but rather a defendant in an action for defamation and abuse of
10 process. This Court has repeatedly rejected Moulton's previous "whistleblower" claims, in
11 which she alleged the same parties she now fears will retaliate against her conspired to
12 threaten her with physical harm and other retaliatory actions. (See *Moulton I-V*). As Moulton
13 has presented no other evidence showing she is at risk of harm, this factor weighs in favor of
14 denying Moulton's motion to proceed anonymously.

15 Second, Moulton's fears of retaliation are not reasonable. Moulton has provided no
16 evidence that she is at risk of harm or that threats have been made against her. Furthermore,
17 Moulton previously filed five lawsuits in this Court stating the exact facts she now claims
18 subject her to risk of retaliation without any request for anonymity. As Moulton has already
19 publicly alleged the same facts numerous times as a plaintiff without any resulting harm, it is
20 difficult to see why she is suddenly at risk now that she is named as a defendant in this matter.
21 Again, this is not a whistleblower case. Moulton is the defendant and is not bringing any
22 affirmative matters against another party or being accused of conduct that would cause others
23 to retaliate against her. Moulton's belief that she is at risk of retaliation is thus unreasonable.

24 Finally, it is not evident that Moulton is particularly vulnerable to retaliation. Moulton has
25 failed to show that she is at risk of retaliation and that her fears are reasonable. Yet even if
26 Moulton was at risk because she is named as a defendant in a case for defamation and abuse
27 of process, Moulton resides in California while the parties who she claims conspired to harm
28

1 her are all located in Nevada.² Moulton also has not alleged she has had any contact with the
 2 parties who are supposedly attempting to harm her. Based upon these facts, Moulton is not
 3 significantly vulnerable to the "unlawful arrest and personal harm" that she fears. (Mot. to
 4 Proceed Anonymously (#42) at 9).

5 As Moulton has failed to show special circumstances exist that would justify secrecy,
 6 Moulton's motion to proceed anonymously is denied.

7 **II. Motion to Dismiss**

8 Moulton has also filed a 45-page motion to dismiss, arguing that Kern has failed to state
 9 a claim on her causes of action and that the causes of action are barred for other various
 10 reasons. (Mot. to Dismiss (#45)). For the following reasons, this motion is granted in part and
 11 denied in part.

12 **A. Failure to State a Claim**

13 To avoid a Rule 12(b)(6) dismissal, a complaint must plead "enough facts to state a
 14 claim to relief that is plausible on its face." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
 15 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim
 16 is plausible on its face "when the plaintiff pleads factual content that allows the court to draw
 17 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*
 18 *Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Although detailed factual allegations are
 19 not required, the factual allegations "must be enough to raise a right to relief above the
 20 speculative level." *Twombly*, 550 U.S. at 555. A pleading that offers merely "labels and
 21 conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* Nor
 22 does a complaint suffice if it only tenders "naked assertion[s]" that are devoid of "further factual
 23 enhancement." *Id.* at 557.

24 Kern has properly stated a claim for relief in her first cause of action for abuse of

26 ² See Mot. to Quash (#21) at 9; Compl. (#1) at 1-2. The parties Moulton asserts have
 27 conspired against her include the justice court and police department of the City of Sparks,
 28 Lakeside Plaza, and Kern. (Mot. to Proceed Anonymously (#42) at 9).

1 process. To prevail on a claim of abuse of process, the plaintiff must show that the defendant
2 (1) had an ulterior purpose in bringing legal action other than resolving a legal dispute, and (2)
3 used the legal process in a manner that is not proper in the regular conduct of the proceeding.
4 *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 478 (Nev. 1998). Kern here has
5 properly alleged that Moulton had an ulterior purpose in bringing her five prior actions in this
6 Court. All of Moulton's prior actions had been dismissed, yet she continued to file complaints
7 against Kern based on the same underlying events. As all of her prior complaints had been
8 dismissed as meritless, it is unlikely Moulton was bringing the complaints to resolve a valid
9 legal dispute, but rather to merely harass Kern for her role in the foreclosure. Using the legal
10 process to harass a party is clearly not proper in the regular conduct of the proceeding.
11 Accordingly, Kern has adequately stated a claim for abuse of process.

12 Kern however has failed to state a claim in her remaining causes of action. The
13 remaining independent causes of action for defamation per se, business disparagement, and
14 invasion of privacy/false light are all based on out-of-court statements published by Moulton
15 regarding Kern which she claims were false and defamatory. (Compl. (#1) at 4). The
16 complaint with regard to these claims contains nothing but formulaic recitations of the
17 elements of the listed causes of action and is completely void of any factual allegations that
18 would support these claims. As opposed to her claim for abuse of process in which the
19 previous legal actions brought by Moulton are specifically identified, the complaint does not
20 identify a single statement made by Moulton that would support the causes of action. Because
21 the complaint does no more than recite the elements of the causes of action and is completely
22 devoid of factual allegations in support of these claims, the Court dismisses Kern's claims of
23 defamation per se, business disparagement, and invasion of privacy/false light.

24 Kern's final claim for injunctive relief is similarly dismissed. A claim for injunctive relief
25 is a remedy and not an independent cause of action. See *In re Wal-Mart Wage & Hour Emp't*
26 *Practices Litig.*, 490 F.Supp.2d 1091, 1130 (D. Nev. 2007); *Miller v. MERSCORP, Inc.*, 2011
27 WL 6097751, at *8 (D. Nev. 2011); *Anderson v. Deutsche Bank Nat'l Trust Co.*, 2010 WL
28 4386958, at *5 (D. Nev. 2010). In this case, the claim for injunctive relief requests that the

1 Court order "Defendant to re-tract the statements she has made about Kern and to prohibit
2 Defendant from publishing further false and defamatory statements about Kern in the future."
3 (Compl. (#1) at 7). As Kern is seeking injunctive relief with regard to the out-of-court false and
4 defamatory statements supposedly made by Moulton and not with regard to Moulton's filing
5 of additional complaints against Kern, the claim for injunctive relief is premised on Kern's
6 claims for defamation per se, business disparagement, and invasion of privacy/false light, and
7 not upon Kern's claim for abuse of process. Because Kern has failed to state a claim for the
8 causes of action upon which the claim for injunctive relief is based, she has failed to state a
9 claim for injunctive relief as well, and the claim is consequently dismissed.

10 **B. Remaining Arguments**

11 In Moulton's rambling motion to dismiss she states several other reasons that the
12 complaint should be dismissed. These reasons include: the Court lacks jurisdiction, the claims
13 are time barred, equal protection violations, the Communications Decency Act prohibits
14 liability, the action is barred by Nevada's anti-SLAPP statute, that Kern is a state actor and the
15 matter one of public interest, Noerr-Pennington immunity, fair use, innuendo is not defamation
16 per se, nonactionable opinion is protected, the statements were true, the false light claim is
17 duplicative, there is no actual malice, Kern engaged in abuse of process, failure to plead
18 special damages, and that Kern has filed the complaint in retaliation to Moulton's whistleblower
19 complaints. The majority of these claims merely recite the law and provide no substantive
20 arguments as to why they justify dismissal of the complaint. Some of the claims have no
21 bearing on the issues presented in the complaint, such as the "arguments" for fair use and
22 equal protection violations. Because these claims do no more than recite the law and do not
23 provide any valid reasons for dismissing the remaining abuse of process claim at this time, the
24 abuse of process claims survives Moulton's motion to dismiss.

25 **III. Motion for Disqualification**

26 Mouton has additionally filed a motion to disqualify Chief Judge Robert C. Jones from
27 adjudicating this case. (Mot. to Recuse (#47)). She argues that Chief Judge Jones should
28 recuse himself because (1) he allowed Kern to commit perjury in his courtroom without

1 sanctioning him—which (she claims) shows clear favoritism to Kern; (2) he has previously
2 adjudicated numerous cases in which Moulton was named as a party and is therefore “too
3 close to this present case to remain impartial”; and (3) because he may be called as a material
4 witness by Moulton to testify that Kern committed perjury in his courtroom. (Mot. to Recuse
5 (#47) at 10, 20). Kern argues that this motion is nothing more than a reiteration of a motion
6 to disqualify Chief Judge Jones that Moulton filed in *Moulton V*, which was denied by this Court
7 on March 10, 2011. (Opp’n to Mot. to Recuse (#52) at 3; *Moulton V* (#37)).

8 A judge must disqualify himself “in any proceeding in which his impartiality might
9 reasonably be questioned,” 28 U.S.C. § 455(a), where he has a bias or prejudice against a
10 party or personal knowledge of the facts of a case, *id.* § 455(b)(1), where he or a former
11 associate has previously served as a lawyer or witness in the matter, *id.* § 455(b)(2)-(3), where
12 he or a close family member has a financial interest in the matter or other interest that could
13 be substantially affected by the outcome, *id.* § 455(b)(4), or where he or certain family
14 members or their spouses are a party, lawyer, or witness in the proceeding or will be
15 substantially affected by the outcome, *id.* § 455(b)(5).

16 Moulton has failed to present any evidence that would satisfy any of the above
17 conditions requiring disqualification. Moulton makes only conclusory allegations that Kern
18 committed perjury in this Court and that by not sanctioning Kern for committing perjury, Chief
19 Judge Jones has shown he is impartial. Moulton never states what statements constitute
20 perjury, never establishes that any statement was false, and has failed to provide any support
21 for her assertion that the reason Kern was not sanctioned is because of impartiality on the part
22 of Chief Judge Jones. Furthermore, Moulton continues to misconstrue the nature of this
23 action. Moulton is not the plaintiff here and this matter does not concern whether Kern
24 committed perjury, but whether Moulton engaged in defamation and abuse of process. Chief
25 Judge Jones is therefore not a material witness in the matter because this suit is not being
26 brought against Kern for perjury. Moulton’s motion for disqualification is accordingly denied.

27 Kern further contends in her opposition to Moulton’s motion for disqualification that
28 because this motion is nothing more than a reiteration of previously litigated issues, Moulton

1 should be sanctioned under Fed. R. Civ. P. 11. (*Id.* at 3-4). Rule 11(b) provides that by
2 presenting a pleading to the court, the party certifies to the best of their knowledge, after
3 reasonable inquiry, that "it is not being presented for any improper purpose, such as to harass,
4 cause unnecessary delay, or needlessly increase the cost of litigation." FED. R. CIV. P.
5 11(b)(1). The court may impose sanctions on any party it determines has violated Rule 11(b)
6 so long as the party is given notice and a reasonable opportunity to respond. FED. R. CIV. P.
7 11(c)(1). Kern contends that Moulton's motion for disqualification sets forth no new facts or
8 legal authority as to why the motion should be granted beyond what was argued and rejected
9 in her motion for disqualification in *Moulton V*, and therefore seeks sanctions for the time and
10 expense incurred in responding to this motion. (Opp'n to Mot. for Disqualification (#52) at 4).

11 Moulton's motion for disqualification essentially presents the same arguments that were
12 rejected in Moulton's previous motion for disqualification. The only argument in her present
13 motion that was not previously raised was the claim that Kern committed perjury without
14 sanction in this Court. As stated above, this argument is unsupported and frivolous and is no
15 more than another attempt to harass Kern and needlessly increase the cost of litigation.
16 Although the Court presented Moulton with an opportunity to respond and to justify the filing
17 at a hearing held on February 21, 2012, Moulton failed to appear. Accordingly, the Court
18 orders sanctions against Moulton in favor of Kern in the amount of \$500 to cover the costs of
19 this frivolous motion. The Court further warns Moulton that she risks further sanctions by filing
20 additional frivolous motions in this Court.

21 CONCLUSION

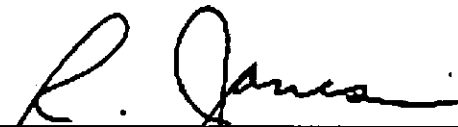
22 For the foregoing reasons, IT IS ORDERED that Moulton's motions to proceed
23 anonymously (#42) and for disqualification (#47) are denied.

24 IT IS FURTHER ORDERED that Moulton's motion to dismiss (#45) is granted in part
25 and denied in part. Specifically, the motion is denied with regard to Kern's claim for abuse of
26 process, but is granted with regard to Kern's claims for defamation per se, business
27 disparagement, invasion of privacy/false light, and injunctive relief.

28 IT IS FURTHER ORDERED that Kern is awarded sanctions in the amount of \$500

1 against Moulton to cover the costs of responding to Moulton's baseless and repetitive motion
2 for disqualification.

3 DATED: This 11th day of May, 2012.

4
5 
6 _____
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28